

# BenAlert

BENEFIT TRENDS AND LEGISLATIVE UPDATES

NOVEMBER 2008



HOWITT  
Benefit Services

Howitt Benefit Services is pleased to provide you with periodic updates on benefit trends and legislative updates. As part of our valuable services, we want to ensure that you are in compliance and well-informed of the ongoing changes in our industry.

## In this BenAlert:

- **California Same-Sex Marriages: Impact of Proposition 8**

## California Same-Sex Marriages: Impact of Proposition 8

On November 4, 2008, California voters approved an initiative to amend the California Constitution to define marriage as between a man and a woman. Special interest groups already have filed petitions with the California Supreme Court urging invalidation of Proposition 8. The purpose of this BenAlert is to discuss the impact of Proposition 8 at this moment.

### BACKGROUND

1. **Original California Supreme Court Decision.** On May 15, 2008, the California Supreme Court ruled 4-3 that a same-sex marriage ban violated the California Constitution. Thirty days later, county clerks throughout California began issuing marriage licenses to same-sex couples. It is estimated that approximately 18,000 same-sex marriages have been performed.
2. **Status of Existing Same-sex Marriages.** According to California Attorney General, Jerry Brown, the State intends to recognize those marriages as valid on the basis that they were contracted at a time when same-sex marriage was the law in California. Most, but not all legal scholars support the Attorney General's position. Unfortunately, the ballot argument for Proposition 8 says that passage will invalidate these marriages.

### DISCUSSION

1. **Health Care Coverage.** Based on the Attorney General's views, we expect that California insurers and health care service organizations (HMOs) will continue to

provide health care coverage to same-sex spouses so long as the marriage occurred in California between June 17, 2008 and November 4, 2008.

2. **State Income Taxation.** Absent direction from the California Franchise Tax Board, it is probable that for California state income tax purposes, the value of the health coverage provided to a same-sex spouse must be treated as income to the employee at least for coverage provided on or after November 5, 2008. The issue, then, is whether employers should start withholding state income tax (based on the value of the coverage) from the employee's paycheck between now and December 31, 2008 and report it as income for state tax purposes at the end of the year.
3. **Federal Income Taxation.** Since federal law does not recognize same-sex marriages, the Internal Revenue Code requires employers to impute and report additional income based on the fair market value of the coverage provided to the same-sex spouse in the same way it does for domestic partners who don't qualify as legal tax dependents under IRC Section 152.

## ACTION PLAN

Our ERISA attorney recommends that each affected employer seek the advice of tax counsel on this matter. At a minimum, we believe the employer has a duty to notify employees with California same-sex spouses covered under the employer-sponsored health plan that they should seek the advice of their own tax counsel as to the potential of additional income based on the value of the employer-provided coverage. Our assumption is that many employers will report the imputed income for the period November 5 – December 31, 2008, for state tax purposes for 2008 .

We will keep you informed of any developments. For more details, please call Larry Seiden, our Compliance Officer, at 408-997-3019.

\*\*\*\*\*

*Howitt Benefit Services (HOWITT) is not an attorney firm and HOWITT is not giving legal advice or interpreting the CMS or California Legal code. This update is published as an information source for our clients and colleagues. It is general in nature and not a substitute for legal advice or an opinion on a particular case.*

**Copyright © Alfred B. Fowler, Attorney at Law.  
All Rights Reserved. Reprint with permission only.**

**This legislative update is published as an information source for our clients and colleagues. It is general in its nature and is no substitute for legal advice or an opinion in a particular case.**